

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH.**

Date of decision :November 30, 2006.

Darshan Singh Vs. State of Punjab

CORAM: Hon'ble Mr. Justice Virender Singh

Present: Mr. RS Ahuja, Advocate, Amicus Curiae
for the appellant.
Mr. MS Sidhu, Senior DAG, Punjab.

Virender Singh, J.

Appellant Darshan Singh son of Udham Dass, resident of Saffuwala stands convicted under Section 15 of the Narcotic Drugs and Psychotropic Substances Act (for short the `Act') vide impugned judgement of learned Additional Sessions Judge, Faridkot dated May 14, 1999 for allegedly keeping in his conscious possession 10 gunny bags, each containing 37 kilograms of poppy husk. He was sentenced to undergo RI for ten years and to pay a fine of Rs. one lac, in default thereof to further undergo RI for a period of two years.

In brief, the case of the prosecution is that on 24-8-1997 SI Tehal Singh (PW6) along with other police officials including SI Jang Singh (PW7) was going from village Saffuwala towards village Mothanwala in a government vehicle. When they reached near the bridge of the canal minor situated in the area of village Mothanwala, the appellant

was found standing at a distance of about one Killa towards the eastern side of the bridge of the canal minor. On seeing the police party, he sat down in the bushes. On suspicion he was apprehended. One Gurdip Singh son of Gurbachan Singh resident of Moga (given up as having been won over) was also joined in the police party. The appellant was apprised of his right of being searched before a gazetted officer or a Magistrate. Upon his choice, Sh. Bachan Singh Randhawa, the then Superintendent of Police Moga, a gazetted officer, was called at the spot, who disclosed his identity to the appellant. Thereafter on latter's direction the gunny bags were searched. Each bag was found to contain 37 Kgs of poppy husk. 250 grams as sample was extracted from each of the bags. The remaining poppy husk was put in the same gunny bags, which were also converted into parcels. All the samples and remainder bags were sealed with the seals bearing inscriptions 'TS'(for Tehal Singh) and 'BSR' (for Bachan Singh Randhawa). All these articles were taken into possession vide recovery memo-Exhibit PA, which was signed by Jang Singh, PW Gurdip Singh and Sh. Bachan Singh Randhawa, SP. All other formalities were also completed at the spot. Ruqa (Exhibit PK) was sent to the Police Station on the basis of which formal FIR (Exhibit PK/1) was recorded in Police Station Sadar Moga. Rough site-plan (Exhibit PL) was prepared. On return to the police station the entire case property was kept by SI Tehal Singh with him. It was handed over to ASI Baldev Singh for producing before the concerned court (Illaqa Magistrate) along with the appellant. The case property was deposited with Moharrir Head Constable Bhupinder Singh (PW3). As per

report (Exhibit CE) of the Chemical Examiner, the sample substance was found to be poppy husk. After completion of the investigation the appellant was challaned.

The prosecution in support of its case has examined the following witnesses:

Bachan Singh Randhawa SP, who was a witness to the recovery and was called at the spot after the appellant was apprehended.

PW2 ASI Baldev Singh had stated that on 25.8.1997 the case property consisting of ten bags along with ten samples duly sealed with the seal impressions of 'TS' and 'BSR' were handed over to him and on his written request the same were produced before the concerned Illaqa Magistrate, who passed formal order thereon. On return he had deposited the case property with SI Tehal Singh, the Investigating Officer.

PW3 HC Bhupinder Singh had tendered into evidence his affidavit Exhibit PD in order to prove the link evidence.

PW4 Jagsir Singh LC had produced the special report before the Illaqa Magistrate.

PW5 constable Janta Singh had tendered into evidence his affidavit Exhibit PE to prove the link evidence.

PW6 is SI Tehal Singh, the Investigating Officer, whose investigation had already been alluded to in the preceding paras.

PW7 is SI Jang Singh, another witness to the recovery, who had supported the case of the prosecution.

Gurdip Singh the alleged independent witness was given up as

having been won over by the appellant.

The plea of the appellant taken in his statement recorded under Section 313 of the Code of Criminal Procedure is of false implication. However, he has not adduced any evidence in his defence.

After appreciating the entire evidence, the trial Court has convicted and sentenced the appellant, as already indicated above. Hence this appeal.

I have heard Mr. RS Ahuja, who is representing the appellant as amicus curiae and Mr. MS Sidhu, learned Senior Deputy Advocate General, Punjab. With their assistance I have minutely perused the entire record.

The primary attack launched by Mr. Ahuja on the prosecution case is that the conscious possession of the contraband qua the appellant is not proved to the hilt and, therefore, he deserves acquittal on this score alone. Strengthening his arguments, he submits that the appellant is resident of village Saffuwala whereas according to SI Tehal Singh, the Investigating Officer the recovery was effected in the area of village Mothanwala where the appellant was allegedly standing at a distance of about one killa towards the eastern side of the bridge of the canal. He then submits that according to SI Jang Singh (PW7), who is also a witness to the recovery, the place of recovery was one killa towards eastern side of the bridge. As per the rough site-plan the bags containing poppy husk were found in the fields of one Hazara Singh son of Pakhar Singh. Even on the other side of the canal minor, there are fields of other persons. In this

situation, in all fairness, the Investigating Officer should have conducted further investigation to know as to whether the appellant was really having the conscious possession of the contraband or not. Simply that he was found sitting near the bags or after seeing the police party reacted in a particular manner by trying to hide himself, that fact by itself would not be enough to hold that the contraband allegedly recovered belonged to him and he, in fact, was in conscious possession thereof.

In support of his arguments, Mr. Ahuja has relied upon a judgement of Hon'ble Supreme Court rendered in **State of Punjab Vs. Balkar Singh and others, 2004(3) SCC 582**. He also relies upon another judgement of this Court rendered in **Hari Singh Vs. State of Punjab, 2006 (1) RCR (Criminal) 738**, in which Balkar Singh's case (supra) has been followed and the accused who were found sitting on the bags were acquitted on the ground that it could not be said that they were in custody or possessio of the bags.

Mr. Ahuja then contends that despite the fact that an independent witness namely Gurdip Singh was joined by SI Tehal Singh, still the seal was handed over to SI Jang Singh (PW7), who at that time was working under him as Additional Station House Officer at police station Sadar Moga itself. May be that as per the prosecution case Sh. Bachan Singh Randhawa , Superintendent of Police (Detective) Moga had also put his seal on the sealed parcels at the spot, still the possibility of tampering with the case property cannot be ruled out. Dwelling upon his arguments, Mr. Ahuja submits that producing of case property before the

Illaqa Magistrate would not lend any assurance that the same could not be tampered with as according to the order (Exhibit PC/1) passed on the request application (Exhibit PC), it is simply mentioned that the case property be deposited in the Malkhana. There is no order that the same was checked by the concerned Magistrate or he had found all the seals in tact.

Attacking the case of the prosecution yet from another angle, Mr. Ahuja submits that although the seal impression of seals bearing inscriptions 'TS' and 'BSR' were allegedly prepared at the spot, yet non preparation of the FSL form at the spot shows that the link evidence is missing in this case, which is again fatal to the prosecution. Had the FSL form along with the case property been produced before the Illaqa Magistrate on the next day of the recovery, the concerned court would have cross-checked all the seals and given a note in this regard. Once it is not done, there is every possibility of preparation of the sample seals chit subsequently at any stage before sending the same along with the sample to the Forensic Science Laboratory for analysis. The learned counsel then submits that even in the request application (Exhibit PC) moved before the Illaqa Magistrate for obtaining order regarding deposit of the case property in the Malkhana, the factum of preparation of sample seals is missing. In order to knock down the case of the prosecution on the point of link evidence, the learned counsel relies upon the judgement of this Court rendered in **Bhola Singh Vs. State of Punjab, 2005(2) RCR (Criminal) 520.**

Mr. Ahuja has also pointed out certain discrepancies in the case

of the prosecution with regard to the timing of sending ruqqa, weights etc, but primarily sets store by the aforesaid two submissions only and prays for acquittal of the appellant.

The contentions of Mr. Ahuja are opposed by Mr. Sidhu, the learned State counsel contending that there is heavy recovery effected from the appellant that too in the presence of a senior police official (Superintendent of Police) and thus there is no chance of false implication in this case. He then submits that even if certain discrepancies have crept in the statements of the prosecution witnesses, the same have no adverse effect on the case of the prosecution as such type of discrepancies are bound to occur even in the testimony of most truthful witnesses with the passage of time. He further submits that non-handing over of the seals to an independent witness would again be not fatal as the case property was sealed with the seal of a senior police official. The appellant has, thus, no escape.

After hearing the rival contentions of either side, I find substance in the submissions advanced by Mr. Ahuja especially with regard to conscious possession.

The case set up by SI Tehal Singh as is clear from his substantive evidence is that ten bags were lying at a particular place and the appellant was found sitting on the said gunny bags at that time. He after seeing the police party sat down in the bushes. SI Tehal Singh, however, admits that in the rough site-plan he had not shown any bushes nearby the place of recovery. No doubt, no specific question was put to this witness

by the learned defence counsel with regard to ownership of the fields but a careful perusal of the rough site-plan (Exhibit PL) prepared by the Investigating Officer shows the fields of Hazara Singh on the eastern side and the fields of Gurmel Singh and Gurdip Dass on the western side. In this situation, it was incumbent upon the Investigating Officer to investigate further regarding transportation of the said bags as also the ownership of the contraband in order to prove that the appellant was really in conscious possession of the bags. There is no evidence to show that the bags were kept by the appellant or some one closely associated with him was owner of the said fields. No doubt, no satisfactory explanation has been put forth by the appellant to project his innocence except that a suggestion has been put to SI Tehal Singh that the case has been planted upon the appellant just to show that some paper work had been done regarding the recovery and that a poor labourer was brought from the village and subsequently the present case was foisted upon him, still the same would not be enough to conclude that the prosecution has been able to prove conscious possession of the prohibited substance qua the appellant. The appellant was from a different village (Saffuwala) and the recovery is effected in the area of village Mothanwali as is clear from the examination-chief of the Investigating Officer. In this particular situation, in order to bring the investigation to a logical end, it should have been investigated further to know as to how the appellant was found present at that very place along with ten bags of poppy husk. The matter does not rest here. From the personal search of the appellant a sum of Rs. 47/- only were allegedly

recovered. In his statement under Section 313 of the Code of Criminal Procedure, he stated that he was a labourer. From this it can easily be inferred that the appellant was not in a position to buy this much quantity of poppy husk. So taking the case from any angle, in all fairness SI Tehal Singh, the Investigating Officer should have conducted further investigation in this case.

In **Balkar Singh's case** their Lordships while dealing with almost the similar situation observed in para 3 as under:

“__The High Court by the impugned judgement stated that the prosecution failed to prove that these respondents were in conscious possession of the poppy husk recovered by the police. The evidence by the prosecution consisted of the testimony of PW 1 Balbir Singh and PW 2 ASI Jarnail Singh. Both these witnesses deposed that they found the respondents sitting on the bags of poppy husk. The recovery was effected from a field in Village Lohgarh. The respondents belonged to different villages. The respondent Balkar Singh is a resident of Village Bira Bedi in District Hisar while respondent Munish Chand is a resident of Farukhabad. The police did not make any investigation as to how these 100 bags of poppy husk were transported to the place of incident. They also did not adduce any evidence to show the ownership of the poppy husk. The presence of the respondents at the

place from where the bags of poppy husk were recovered itself was taken as possession of these bags by the police. In fairness, the police should have conducted further investigation to prove that these accused were really in possession of these articles. The failure to give any satisfactory explanation by the accused for being present on that place itself does not prove that they were in possession of these articles. Though the respondents raised a plea before the Sessions Court, the same was not considered by the Sessions Judge in the manner in which it should have been considered. We do not think that the High Court erred in holding that there was no evidence to prove that the respondents were in conscious possession of the poppy husk recovered by the police. The prosecution failed to discharge its obligation to prove the possession of the poppy husk by the respondents. We do not find any infirmity in the judgement passed by the High Court".

The judgement of this Court in Hari Singh's case (supra) relied upon by the learned counsel for the appellant also covers the plea of the appellant on the point of conscious possession. In the said decision Balkar Singh's case (supra) was followed and the accused, who was found sitting on the bags (16 in number) containing poppy husk was acquitted.

While dealing with the question of presumption contained in

Sections 35 and 54 of the Act with regard to the conscious possession, the Hon'ble Full Bench of this Court in **Kashmir Singh Vs. State of Punjab, 2006(2) RCR (Criminal) 477** have observed that the same will not apply against the accused unless he has been given an opportunity to rebut and explain this presumption by putting him a specific question with regard to conscious possession of the contraband under Section 313 of the Code of Criminal Procedure. In the totality of the facts and circumstances of the case in hand, in my view, the said authority also comes at the rescue of the appellant as in his statement recorded under Section 313 of the Cr.P.C., no specific question in this regard was put to him.

Although I do find substance in the other submissions made by Mr. Ahuja with regard to the second flaw qua link evidence, yet I do not detain myself by entering into detailed discussion on that aspect, as I am dislodging the case of the prosecution on the basis of the vital weakness with regard to conscious possession, as discussed hereinabove and have no option except to hold that the views taken by the learned trial Court in convicting the appellant is not sustainable.

Resultantly the instant appeal is allowed, the appellant is acquitted of the charge framed against him. Record reveals that he is in custody and as such shall be released forthwith, if not required in any other case.

[Virender Singh]
Judge

November 30, 2006.
`ask'